

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
DAKOTA WAYNE SEALS and)	CASE NO. 05-32718 HCD
KAREN ELAINE SEALS,)	CHAPTER 7
)	
DEBTORS.)	
)	
)	
DAKOTA WAYNE SEALS and)	
KAREN ELAINE SEALS,)	
PLAINTIFFS,)	
vs.)	PROC. NO. 05-3043
)	
PAYDAY TODAY, INC.,)	
)	
DEFENDANT.)	

Appearances:

Christopher G. Walter, Esq., attorney for plaintiffs, Holmes & Walter, LLP, 111 North Main Street, Post Office Box 26, Nappanee, Indiana 46550; and

Edward R. Hall, Esq., attorney for defendant, 7520 Broadway, Merrillville, Indiana 46410.

MEMORANDUM OF DECISION

At South Bend, Indiana, on November 1, 2005.

Before the court are the “Motion to Vacate Default Order” filed by Payday Today, Inc. (“defendant” or “Payday”), and the “Debtors/Plaintiffs Response to Defendant’s Motion for Reconsideration,” filed by the plaintiffs Dakota Wayne Seals and Karen Elaine Seals (“plaintiffs” or “debtors”). For the reasons presented in this Memorandum, the court denies the Motion to Vacate Default Order.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding

within the meaning of § 157(b)(2)(I) over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

The background facts underlying the issue before this court are uncontested. On March 8, 2004, Karen Seals obtained a loan from Payday for \$200.00. Because the finance fee for the loan was \$25.00, she executed a check for \$225. When the bank did not honor the check, however, Payday brought suit against her in Elkhart Superior Court, Elkhart, Indiana. Attorney Edward R. Hall, counsel for Payday, filed the small claims action (cause number 20D05-0410-SC-03567) on October 11, 2004. According to the Indiana Chronological Case Summary of the Elkhart Superior Court civil docket, the complaint filed against Karen Seals was entitled *Payday Today v. Seals*. However, the party listed as the plaintiff on the state court docket was “Cash in a Flash.” See R. 1, Ex. C; R. 14, Ex. A. The state court plaintiff, Payday or Cash in a Flash, obtained a judgment of \$1,246.00 in the Elkhart Superior Court on November 9, 2004.

Karen and Dakota Seals filed a chapter 7 bankruptcy petition on May 17, 2005. Two days later, notice of the bankruptcy was filed in open court in the Elkhart Superior Court, and a copy was forwarded to Attorney Hall as “attorney for Plaintiff.” See R.1, Ex. A. On June 10, 2005, Payday, by Attorney Hall, filed a Motion for Relief of Stay, seeking relief from the stay on the ground that Payday was not included on the bankruptcy matrix. See R. 1, Ex. B. That motion was filed in the Elkhart Superior Court, not in the federal bankruptcy court.

In response to that state court filing, on June 13, 2005, the debtors filed in the bankruptcy court a Complaint for Violation of Automatic Stay, asserting that Payday’s attempt to collect on the debt through the state

court action violated the automatic stay. *See* R. 1. The Complaint was served on Attorney Hall, as counsel for “Payday Today, Inc., a/k/a Cash in a Flash, Inc.” *See id.* at 3. Attorney Hall was notified that an answer was due by July 18, 2005. *See* R. 3. When no answer was filed, the plaintiffs filed a Motion for Default Judgment against the defendant. *See* R. 4.

The court sent notice to Payday and Attorney Hall that a September 1, 2005 hearing was scheduled on the motion and that objections to the motion were to be filed by August 25, 2005. *See* R. 5. The defendant did not respond to the motion or attend the hearing. However, on August 30, 2005, the defendant filed an Answer to Complaint and Counterclaim, denying the allegations in the Complaint and alleging that the debt owed to it was nondischargeable under 11 U.S.C. § 523(a)(2). *See* R. 8.

On September 1, 2005, the hearing went forward, without an appearance from counsel for the defendant or any representative of the defendant. At that time, the court recognized that the defendant’s answer to the complaint was untimely filed and that the bar date for a dischargeability determination (alleged in the defendant’s counterclaim) had passed. On September 6, 2005, it entered its Order of Judgment by Default, granting an injunction against further attempts by the defendant to collect the debt, granting the plaintiffs’ attorney fees in the amount of \$600, and dismissing the defendant’s counterclaim as untimely. *See* R. 10.

Six weeks later, on October 18, 2005, the defendant filed its Motion to Vacate Default Order. In its Brief supporting the motion, Payday pointed out that it was not included on the list of creditors. *See* R. 13 at 2. As a result, it asserted, it was not sent notice of the bankruptcy and therefore could not have responded to the complaint against it in a timely manner. As a further result, it did not have notice of the bar date for dischargeability claims and therefore could not have filed a timely dischargeability complaint. For that reason, Payday argued, its counterclaim should not be considered untimely. Payday reiterated its argument that the state court judgment against Karen Seals was not dischargeable under § 523(a)(2). It urged the court to vacate its judgment against Payday.

The plaintiffs filed a response to the Motion. *See* R. 14. They noted that Cash in a Flash, Inc., c/o Edward R. Hall, was listed as a creditor in their bankruptcy. Notice was sent to the Elkhart Superior Court as well. Attorney Hall, on behalf of Payday, filed a Motion for Relief of Stay in Elkhart Superior Court. The plaintiffs pointed out that their Complaint against Payday was sent to Attorney Hall, on behalf of Payday. According to the plaintiffs, Payday's attorney failed to answer the plaintiffs' Complaint; failed to file a dischargeability complaint on behalf of Payday; failed to ask for an extension of the deadline to file a dischargeability complaint; failed to appear at the hearing on September 1, 2005; and failed to request a continuance of that hearing. Only on August 30, 2005, 42 days after the deadline for a response, did Payday's attorney file an appearance and an Answer to the Complaint. When no one appeared at the hearing to represent Payday, the Order of Judgment by Default was entered. Because Payday did not give a viable reason for its conduct, the plaintiffs asked that its Motion to Vacate be denied.

Discussion

The issue presented to the court is whether it should vacate its Order of Judgment by Default. It certainly is within a bankruptcy court's discretion to grant relief from the entry of a judgment. *See Robb v. Norfolk & Western Ry. Co. (In re Robb)*, 122 F.3d 354, 361 (7th Cir. 1997); *In re McDonald*, 118 F.3d 568, 569 (7th Cir. 1997); *In re Czykoski*, 320 B.R. 385, 388-89 (Bankr. N.D. Ind. 2005). As Payday pointed out, a court may vacate the entry of a default judgment "if a party shows (1) good cause for its default; (2) quick action to correct it; and (3) a meritorious defense." *Robinson Eng'g Co. Pension Plan and Trust v. George*, 223 F.3d 445, 453 (7th Cir. 2000) (quoting *Zuelzke Tool & Eng. Co., Inc. v. Anderson Die Castings, Inc.*, 925 F.2d 226, 229 (7th Cir. 1991)). However, the burden is on the party requesting that a judgment be vacated to establish the proper grounds for relief and to show exceptional circumstances. *See Clark v. Hiller (In re Hiller)*, 179 B.R. 253, 257 (Bankr. D. Col. 1994).

Because the defendant's Motion to Vacate Default Order was filed on October 18, 2005, more than ten days after entry of the court's Order of September 6, 2005, the court treats it as a motion for relief under Federal Rule of Civil Procedure 60(b), which is made applicable in bankruptcy cases under Federal Rule of Bankruptcy Procedure 9024. *See Easley v. Kirmsee*, 382 F.3d 693, 696 (7th Cir. 2004); *Bell v. Eastman Kodak Co.*, 214 F.3d 798, 800 (7th Cir. 2000). Under that rule, "the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding" for such reasons as "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

However, relief under Rule 60(b) is an extraordinary remedy. *See Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 131 F.3d 625, 628 (7th Cir. 1997); *Provident Sav. Bank v. Popovich*, 71 F.3d 696, 698 (7th Cir. 1995); *In re Czykoski*, 320 B.R. at 389 (citing cases). The movant, in this case the defendant, has the burden of proving that there are exceptional circumstances and sufficient grounds to warrant vacating the court's order by showing a reason or good cause for the mistake and the existence of a meritorious defense. *See Jones v. Phipps*, 39 F.3d 158, 162 (7th Cir. 1994); *In re Hall*, 259 B.R. 680, 682 (Bankr. N.D. Ind. 2001). The Supreme Court's "excusable neglect" definition in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 113 S. Ct. 1489, 123 L.Ed.2d 74 (1993), is used in Rule 60(b) determinations. *See In re Robb*, 122 F.3d at 359 (analyzing the broader meaning of excusable neglect after *Pioneer*).

The defendant Payday did not specify a particular Rule 60(b) ground upon which the court's Order should be vacated. It claimed that it "inadvertently" sent its motion for relief of stay to the state court, but did not assert that its misfiling constituted excusable neglect. *See, e.g., In re Liptak*, 2004 WL 2515828 at *4 (N.D. Ill. Nov. 1, 2004) (finding that the debtor filed in the wrong court, concluding that he failed to establish excusable neglect). Instead, Payday relied primarily on the plaintiffs' alleged mistake in listing Cash in a Flash, rather than Payday, as a creditor in their bankruptcy. It argued that Cash in a Flash is a completely separate company from Payday and that the debtors' inclusion of Cash in a Flash as a creditor on their matrix did not cover Payday. It is noteworthy, however, that Cash in a Flash was described in the defendant's Brief as "[a]nother Payday lender,"

R. 13 at 2, and was listed as the “Plaintiff” on the docket of the Elkhart Superior Court lawsuit entitled *Payday Today v. Seals*. The court finds that the confusion concerning the identity of the plaintiff in the Elkhart Superior Court case was caused by the state court plaintiff itself. Payday filed its lawsuit, in state court, identifying itself as both Payday and Cash in a Flash; it cannot later deny any relationship between the entities. In any case, whatever the relationship between them, Edward Hall was listed as counsel for both in the state court lawsuit, and the debtors’ documents were served upon him on behalf of Payday, “also known as Cash in a Flash.” In the court’s view, the debtors sensibly resolved the method of addressing the doubly-named state court plaintiff.

The court also finds that Payday’s assertion that it did not have notice of the bankruptcy is a red herring. Attorney Hall, appearing as counsel for both Payday and Cash in a Flash, was served notice of the bankruptcy filing and stated that he saw the notice presented to the Elkhart Superior Court. *See* R. 13 at 2. The court finds that he was properly served, was reasonably apprised that an action was pending against Payday, and was advised of the opportunity to respond. *See Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319-20, 70 S.Ct. 652, 659-60, 94 L.Ed. 865 (1950); *Swaim v. Moltan Co.*, 73 F.3d 711, 720-21 (7th Cir.), *cert. denied*, 517 U.S. 1244 (1996). Attorney Hall himself “prepared a memo for his staff to file a motion for relief of stay.” R. 13 at 2. The notice of the bankruptcy filing clearly indicated that the case was filed in the United States Bankruptcy Court for the Northern District of Indiana. The court finds, therefore, that counsel for Payday had both actual and constructive notice of the bankruptcy filing and that he acted on the notice by moving for a lifting of the automatic stay. Because Payday did not even claim that there was an exceptional circumstance or good cause for the “inadvertent” filing of that motion in the state court, instead of the bankruptcy court, this court declines to treat that error as “excusable neglect.”

Payday did claim, however, that its delay in filing its Answer and Counterclaim was unintentional: Because it was in contact with the plaintiffs and had attempted to settle the case, the filing of its Answer and Counterclaim in this court was belated, it said. In its consideration of whether Payday’s unintended late filing could constitute “excusable neglect,” the court turned to the Supreme Court’s definition of “neglect” in *Pioneer*:

It found that the term “encompasses both simple, faultless omissions to act and, more commonly, omissions caused by carelessness.” *Id.* at 388, 113 S. Ct. at 1494-95. It held that the determination of “excusable neglect” is

at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include . . . the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Id. at 395, 113 S. Ct. at 1498. In this case, the court finds that Payday’s delay in filing its Answer was entirely within the reasonable control of Payday and its counsel. *See id.* An attorney has a duty to be diligent about the status of his or her cases and, if necessary, to seek clarification from the court. *See Easley*, 382 F.3d at 698 (concluding that the attorney’s inattentiveness to litigation was inexcusable neglect, not excusable carelessness). It was this attorney’s responsibility, as counsel for both Payday and Cash in a Flash, to read the served documents and to verify deadlines.

When the court considered all the relevant circumstances, it noted that a confusion originated in state court when the plaintiff was named as both Payday and Cash in a Flash. Payday may not now use that confusion as a sword (by seeking relief from the stay for Payday, because it was not included as a creditor in the debtors’ bankruptcy) and as a shield (by claiming it did not know of the bankruptcy deadlines and thus should be excused for its untimely or failed filings). Counsel was fully informed of the plaintiffs’ bankruptcy and of their adversary complaint. His numerous procedural errors – filing a motion for stay relief in the wrong court, filing an untimely answer to the debtors’ complaint, failing to respond to the Motion for Default Judgment or to appear at the court hearing on the motion, failing to appeal that decision – do not constitute excusable neglect. The court finds that Payday has not demonstrated good cause for its default. Its contention that the debtors picked the wrong state court plaintiff to list on its matrix is not a meritorious defense. Payday, a corporation with legal sophistication in the business world, has not demonstrated that it is justified in invoking the extraordinary remedy of Rule 60(b) to vacate the court’s Order. The court therefore denies the Motion to Vacate Default Order filed by Payday.

Conclusion

For the reasons presented above, the Motion to Vacate Default Order filed by defendant Payday Today, Inc. is denied pursuant to Federal Rule of Civil Procedure 60(b) and Federal Rule of Bankruptcy Procedure 9024.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT